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Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1416

DELTA COUNTY LEVEE IMPROVEMENT DISTRICT NO. 2, ET AL., *Petitioners*

v.

OBIE P. LEONARD, JR., ET AL., *Respondents*

RESPONDENTS' ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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RESPONDENTS' ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

STATEMENT OF THE CASE

Petitioners' (hereinafter referred to as "Levee Improvement District") statement of the case is correct but incomplete. The statement does not comply with U.S.Sup.Ct. Rule 23(f), 28 U.S.C.A. in that a review of a state court judgment is sought by Levee Improvement District's petition for a writ of certiorari, and nowhere does the statement of the case specify the stage in the proceedings in the District Court of Delta County, which is the court of first instance, nor in the

Appellate Courts at which, and the manner in which, the alleged federal question sought to be reviewed herein was raised. Respondents are hereinafter referred to as "the Leonards."

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

(1) There are no federal questions present in the case.

(2) The decision of the Texas Supreme Court is correct and in accordance with settled principles of law.

(3) The granting of a writ of certiorari would require the resolution of questions of fact decided adversely to Levee Improvement District in the Texas courts.

ARGUMENT IN SUPPORT OF REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

(1) THERE ARE NO FEDERAL QUESTIONS PRESENT IN THE CASE.

This case was tried before the District Court of Delta County, Texas, appealed to the Court of Civil Appeals for the Sixth District at Texarkana, Texas, and then to the Texas Supreme Court. At absolutely no time during this case at any stage of the proceedings has any question been raised concerning the validity of Article 3773, Vernon's Tex.Rex.Civ. Stat., nor has any claim been made that it was repugnant to the Fourteenth Amendment to the United States Constitution The filing of this petition for writ of certiorari is the first time in this case that validity of Article 3773, Vernon's Tex. Rev.Civ.Stat., has been drawn into question. That is, of course, the reason there has been no compliance with U.S.Sup.Ct. Rule 23(f), 28 U.S.C.A. It is well settled that the U. S. Supreme Court cannot decide issues which are for the first time raised in the petition for writ of certiorari, *Tacon v. Arizona,* 410 U.S. 351, 35 L.Ed.2d 346, 93 S.Ct. 998.

This case simply involved a procedural question of how to prevent a judgment against a political subdivision created

under Section 59a of Article XVI of the Texas Constitution, which would include a levee improvement district, from becoming dormant. The Texas Supreme Court held that since Article 3773, Vernon's Tex.Rev.Civ.Stat, clearly states that if a writ of execution is obtained within 10 years from date of judgment and every 10 years thereafter ". . . the judgment shall not become dormant. . . ." a judgment against the Levee Improvement District would not become dormant if this statute was complied with. It is undisputed that the Leonards complied with this statute by obtaining writs of execution within 10 years from date of judgment and every 10 years thereafter. This suit for mandamus was then brought to compel the levy and collection of taxes to pay the judgments. The Texas Supreme Court held (as did the Court of Civil Appeals) that the judgments were not dormant because Article 3773, Vernon's Tex.Rev.Civ.Stat., had been complied with, that mandamus was proper to collect the judgments and that the Levee Improvement District's defense of laches was inapplicable. Quite obviously, there is no federal question involved in this ruling and the Texas courts did not concern themselves with any federal question in deciding this case.

(2) THE DECISION OF THE TEXAS SUPREME COURT IS CORRECT AND IN ACCORDANCE WITH SETTLED PRINCIPLES OF LAW.

The levee improvement district bonds upon which the original judgments in this case were based state that the full faith, credit and resources of the Levee Improvement District are irrevocably pledged to the payment of the bonds and that a direct annual tax has been levied upon all taxable property in the Levee Improvement District sufficient to pay the interest on the bonds and the principle at maturity.

No effort was ever made by Levee Improvement District to pay either the principal or interest of the bonds at maturity, and none of the bond holders were ever paid. No tax was ever levied to pay the bonds. This is notwithstanding the fact that, as just stated, the full faith, credit and resources of the Levee Improvement District were irrevocably pledged to the payment of the bonds and a tax was to be levied to pay

the interest and principal at maturity. Clearly Levee Improvement District breached its obligation to the bond holders by not paying the principal and interest of the bonds at maturity. Because of the breach of this obligation the judgments in question were taken against the Levee Improvement District.

The statute involved in this case is Article 3773, Vernon's Tex.Rev.Civ.Stat., which reads as follows:

> "If no execution is issued within 10 years after the rendition of a judgment in any court of record, the judgment *shall become dormant* and no execution shall issue thereon unless such judgment be revived. If the first execution has issued within 10 years, the judgment *shall not become dormant,* unless 10 years shall have elapsed between the issue of executions thereon, and executions may issue at any time within 10 years after the issuance of the preceding execution." [Emphasis added]

There has never been any issue in the case about the validity of the various assignments or that abstracts of judgment were properly issued, recorded and indexed. To keep the judgments from becoming dormant, writs of execution were issued within 10 years after the rendition of each judgment and every 10 years thereafter in compliance with Article 3773, Vernon's Tex.Rev.Civ.Stat. This suit for mandamus was then brought to collect the judgments, it being well settled that such judgments can be collected by this means. *City of Austin v. Cahill.* 99 Tex. 172, 88 S.W. 542 (1905); *Voorhies v. City of Houston,* 70 Tex. 331, 7 S.W. 679 (1888); *National Surety Corp. v. Friendswood Independent School District,* 433 S.W. 2d 690 (Tex. 1968). The decision of the Texas Supreme Court was therefore in accord with the Texas law.

In *City of Austin v. Cahill,* supra, a mandamus proceeding was brought by a bond holder against the City of Austin to enforce payment by the City of Austin of an indebtedness partially reduced to judgment due the bond holder for interest accrued on certain water and light bonds issued by the city. The bond holder asked that a writ of mandamus be issued

to, among other things, compel the city of Austin to levy, assess and collect taxes to satisfy the judgment. The Texas Supreme Court, in ordering the writ of mandamus, said that ". . . the refusal to levy taxes to meet municipal obligations according to terms is a public wrong."

The United States Supreme Court, in the case of *East St. Louis v. Amy,* 120 U.S. 600 (1887), had an opportunity to consider a mandamus proceeding to require the mayor and council of East St. Louis to levy a tax to pay a judgment against the city for over $36,000.00. The judgment in favor of Amy was for interest on bonds issued by the city of East St. Louis and for the principal of one bond which had become due. The Circuit Court ruled that it was the duty of the city to levy and collect a direct annual tax sufficient to pay both the interest and the principal as it became due, and as this had not been done, an order was made requiring the levy and collection of a special tax to pay the judgment. This decision was affirmed by the U. S. Supreme Court. The Supreme Court, in affirming, stated:

> "The law required a tax to be levied annually sufficient to pay all interest as it accrued, and the principal when due. This was neglected, and consequently there is now a large accumulation of a debt which ought to have been paid in installments. Thus far the inhabitants have been allowed to escape taxation at the times it ought to have been laid, and to which they were under constitutional obligations to submit. The accumulation of the debt was caused by their own neglect as members of the political community which had incurred the obligation. * * *
>
> The constitutional obligation of the city was not fully met by providing, when the debt was incurred, for the levy and collection of the necessary tax. It required as well the actual levy and collection when needed to pay the debt. This is an obligation that can be enforced by mandamus after judgment caused by a neglect to meet its requirements."

Notwithstanding the clear provisions of Article 3773, Vernon's Tex.Rev.Civ.Stat., the Levee Improvement District argued that the judgments were dormant since the writs of execution could not be used to collect the judgments, and the judgments would therefore not support a writ of mandamus. The Texas Supreme Court disagreed, holding that although the judgments cannot be collected by a writ of execution, the obtaining of a writ of execution provides the only method by which a judgment can be kept alive to be subsequently enforced by mandamus. The argument made by Levee Improvement District has been made to the Texas courts before and rejected. In *Grissom v. F. W. Heilmann Co.*, 130 S.W.2d 1054 (Tex.Civ.App., writ ref'd, 1939) a writ of execution was issued against the judgment debtor within 10 years of the issuance of the first writ in compliance with Article 3773, Vernon's Tex.Rev.Civ.Stat. The judgment debtor had died before the writ was issued, however, and under the statute then in effect, Article 3778, Vernon's Tex.Rev.Civ.Stat., subsequently superseded by Rule 625, Texas Rules of Civil Procedure, when a sole defendant dies after he has a money judgment entered against him, execution shall not issue upon that judgment since the judgment must be satisfied only through proof and payment in the due course of the administration of the debtor's estate. The court in *Grissom* held that although the judgment could not be collected by the writ of execution because of Article 3778, Vernon's Tex.Rev.Civ. Stat., the execution was sufficient to keep the judgment alive and prevent its dormancy.

Levee Improvement District claims in its petition for writ of certiorari that laches is available to defeat the remedy of mandamus because of the lapse of time between the dates the respective judgments were rendered and the date this mandamus suit was brought.

Although there was a delay of years between the rendition of the judgments in this case and the filing of the suit for mandamus, this did not constitute an unreasonable delay under the facts of this case since there was a valid reason for the delay in filing the suit. The undisputed testimony in the

case was that representatives of the Leonards met with Levee Improvement District 25 or 30 times over a period of years to discuss the problem of collecting the judgments, and Levee Improvement District continually recognized that these were valid, binding judgments against Levee Improvement District, and Levee Improvement District wanted to try to settle the matter before a lawsuit was filed. As a matter of fact, Levee Improvement District even hired a delinquent tax attorney who was going to help collect delinquent taxes to pay the judgments. These discussions took place in the period of time between when the judgments were entered and when the suit for mandamus was filed. At no time during this period did Levee Improvement District ever indicate to the Leonards that it did not consider the judgments valid and binding. As a matter of fact, several of the supervisors of Levee Improvement District met with the Leonards' attorney and the levying and assessing and collecting of taxes in settlement of the judgments were discussed and the subject of the amounts of the assessments on a per acre basis was also discussed.

In summary, the uncontradicted and undisputed testimony was that Levee Improvement District recognized the fact that these judgments were outstanding against Levee Improvement District and were valid judgments, and Levee Improvement District was attempting to work with the Leonards in trying to solve the problem of how these judgments could be paid. The Supreme Court of Texas stated:

> "It is undisputed that the Levee Improvement District was attempting to work out a settlement with the plaintiffs for a number of years. Such continued recognition and acknowledgment of a right would not raise an issue of estoppel." [516 S.W.2d at pages 913 and 914; Appendix A to Levee Improvement District's petition for writ of certiorari at page 21]

The law in Texas is clear that the doctrine of laches is inapplicable when there is a continued recognition and ac-

knowledgment of the right, coupled with repeated promises to adjust the same upon which a party relies. *Nuckols v. Stanger,* 153 S.W. 931 (Tex.Civ.App., dism'd. 1913).

It is also undisputed that the Levee Improvement District never changed its position to its detriment in this case. The Texas Supreme Court specifically held that Levee Improvement District ". . . did not show that it had in good faith changed its position to its detriment as a result of the delay." 516 S.W.2d at page 914; Appendix A to Levee Improvement District's petition for writ of certiorari at page 21. Under applicable Texas law, Levee Improvement District had the burden of proof to show that it had in good faith changed its position to its detriment, *City of Fort Worth v. Johnson,* 388 S.W.2d 400 (Tex. 1964), and not only did Levee Improvement District fail to show this, Levee Improvement District did not even plead this in its pleadings in the case nor submit it to the jury; therefore, there was no evidence in the case of any good faith change of position by the Levee Improvement District to its detriment.

Levee Improvement District in its petition confuses landowners with Levee Improvement District and maintains that the landowners changed their position to their detriment. These are two separate entities and this distinction between the two must be kept in mind. The Texas Supreme Court held that it was the Levee Improvement District which must show that it had in good faith changed its position to its detriment as a result of the delay and, of course, as stated above, the Levee Improvement District failed to meet this burden. In its petition for writ of certiorari the Levee Improvement District keeps arguing that it was the landowners who supposedly changed their position as a result of the delay and fails to meet the real question, which is did the Levee Improvement District change its position. The issue of whether the landowners changed their position was not even before the trial court or the Texas appellate courts, so there is no evidence anywhere in the case that the landowners in any way changed their position by purchasing property. Of course, under Texas law the landowners would be charged

with knowledge of the judgments since they were properly abstracted and indexed in the Judgment Records of Delta County. *Thompson v. Clay,* 367 S.W.2d 917 (Tex.Civ.App., n.r.e. 1963). Also the tax records of Delta County have clearly shown all along that there are delinquent taxes outstanding against the property and, consequently, the property owners are charged with knowledge of these delinquent taxes.

Levee Improvement District complains that the amount of the judgment in this case is more than the Leonards paid for the assignments of the judgments. This allegation does not constitute a defense and the amount that was paid by the Leonards for the purchase of the judgments has absolutely nothing to do with the issuance of the bonds and the obligation to pay the bonds. Furthermore, it is quite obvious that the amount paid for the judgments is not material to any issue in the case and is not relevant to the case and is an attempt by Levee Improvement District to infer that the Leonards did not give sufficient consideration for the judgments when, in fact, there is good and legal consideration. As a matter of fact, the trial court struck these allegations from the pleadings of the Levee Improvement District, and no evidence was even allowed on this point.

There would of course be no judgment in this case if the Levee Improvement District had met its legal obligation by paying the bonds at maturity. If after the judgments were obtained the Levee Improvement District had paid the judgments, as it was under a legal obligation to do, no interest would have accrued on the judgments. Notwithstanding the fact that the Levee Improvement District continually recognized the validity of the judgments, it failed to pay the judgments, thereby allowing interest to accumulate. The Leonards are therefore certainly not responsible for the amount of the judgments. Again, as stated by the Supreme Court of the United States in *East St. Louis v. Amy,* supra, "The accumulation of the debt was caused by their own neglect as members of the political community which had incurred the obligation."

(3) THE GRANTING OF A WRIT OF CERTIORARI WOULD REQUIRE THE RESOLUTION OF QUESTIONS OF FACT DECIDED ADVERSELY TO LEVEE IMPROVEMENT DISTRICT IN THE TEXAS COURTS.

The granting of the writ of certiorari would necessarily entail the finding that there had been changes of position by the Levee Improvement District to its detriment when there is no evidence of this or a finding to the effect that the property owners materially changed their position when there is absolutely no evidence of this either. There would also have to be a finding that the meetings between the Leonards and the Levee Improvement District did not take place when in fact this is admitted by both sides. Finally, there has been no federal question raised at any point in state proceedings, so there would have to be some finding to the effect that a federal question was somehow raised when in fact it was not.

CONCLUSION

The Supreme Court of the United States should deny the petition for writ of certiorari because the validity of Article 3773, Vernon's Tex.Rev.Civ.Stat., was never drawn into question as being repugnant to the Fourteenth Amendment to the United States Constitution and the decision of the Texas Supreme Court in no way depended on the resolution of a federal question.

The petition for writ of certiorari should be denied for the further reasons that the decision of the Texas Supreme Court in this case was in every way correct in that the judgments were not dormant because the Leonards in all respects complied with Article 3773, Vernon's Tex.Rev.Civ.Stat., in that writs of execution were issued within 10 years from the date of judgment and every 10 years thereafter, and Article 3773, Vernon's Tex.Rev.Civ.Stat., clearly states ". . . the judgment *shall not become dormant* unless 10 years shall have elapsed between the issuances of execution thereon. . . ."

Laches has no place in this lawsuit since there was not a good faith change of position by Levee Improvement District to its detriment because of the delay in filing the suit. There was no evidence showing a good faith change of position and there was not even an issue submitted to the jury inquiring whether or not there was a good faith change of position by Levee Improvement District. Also, there was a continued recognition and acknowledgment of the Leonards' rights by Levee Improvement District.

Finally, this is a proper case for mandamus since the refusal to levy taxes to meet municipal obligations according to the terms of said obligations ". . . is a public wrong." *City of Austin v. Cahill,* supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 1975, a copy of the foregoing reply to petition for writ of certiorari was served upon counsel for Petitioners, Mr. Ben G. Levy, 2244 West Holcombe Blvd., Houston, Texas, 77025, by mailing same through the United States mail, postage prepaid.

Eugene J. Dozier

Eugene J. Dozier